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DISTRICT I

September 24, 2024

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

David Malkus
Electronic Notice

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Billy Gene Davila 335303
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1106-CRNM State of Wisconsin v. Billy Gene Davila (L.C. # 2021CF1374)

Before Donald, P.J., Geenen and Colón, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Billy Gene Davila appeals from a judgment, entered on his guilty plea, convicting him on one count of second-degree sexual assault of a child. Appellate counsel, David Malkus, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Davila was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, then-fifteen-year-old E.M.M. woke up in the early morning hours and went to use the bathroom in her home. She then went into the living room and Davila—an uncle who was staying with E.M.M.'s family—asked her to sit next to him. Davila "touched [E.M.M.'s] vagina over her clothes and then pulled her pants down." She told him to stop, but he "touched the inside of her vagina with his fingers[,] … licked [E.M.M.]'s vagina and touched her breasts under her shirt." Davila "then pulled his pants down, rubbed his penis and then had penis to vagina intercourse with her." Davila told E.M.M., "If you scream, I will hit you." The assault ended when Davila ejaculated on E.M.M.'s stomach.

Davila was charged with one count of first-degree sexual assault of a child with threat of force, a Class B felony that carried a maximum penalty of sixty years of imprisonment, including a mandatory minimum twenty-five years of initial confinement. *See* WIS. STAT. §§ 948.02(1)(c); 939.50(3)(b); 939.616(1r). During the pendency of the proceedings, E.M.M. tested positive for herpes. After the State obtained a warrant and Davila also tested positive for herpes, he agreed to resolve his case through a plea.

In exchange for Davila's guilty plea, the State agreed to amend the charge to second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2), a Class C felony with a maximum penalty of forty years' imprisonment and no mandatory minimum initial confinement. *See* WIS. STAT. § 939.50(3)(c). The State also agreed to make a sentence recommendation of ten years' initial confinement and ten years' extended supervision. The circuit court conducted a

colloquy, accepted Davila's plea, and later sentenced him to ten years of initial confinement and ten years of extended supervision.

The first issue appellate counsel discusses in the no merit report is whether there would be any arguable merit to challenging Davila's guilty plea. When accepting a defendant's plea, a circuit court must engage the defendant in a colloquy and fulfill several duties, set forth by WIS. STAT. § 971.08 and judicial mandates, in order to ensure that the pleas are constitutionally sound. *See* ***State v. Howell***, 2007 WI 75, ¶26, 301 Wis. 2d 350, 734 N.W.2d 48; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Our review of the record—including the plea questionnaire and waiver of rights form, appended jury instructions, and plea hearing transcript—confirms that the circuit court generally complied with its prescribed obligations for taking a guilty plea.

There were two minor deviations from specified procedures in the circuit court's plea colloquy with Davila. First, the court neglected to ask Davila whether anyone had made any promises, agreements, or threats in connection with the plea, beyond the State's plea offer. *See* ***Bangert***, 131 Wis. 2d at 262. When the circuit court fails to comply with the mandated plea colloquy duties, a defendant may move to withdraw his pleas. *See* ***id.*** at 274. However, the defendant must allege not only the circuit court's failure to perform a duty, but also that the defendant did not know or understand the omitted information. ***Id.*** Here, counsel reports that he "is unable, for reasons outside of the court record, to allege that Mr. Davila entered his plea based on a threat or promise." In addition, we observe that the plea questionnaire form confirms the voluntariness of Davila's plea. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987); *see also* ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794.

Appellate counsel also states that the circuit court "did not advise Mr. Davila of all of the potential immigration consequences provided in WIS. STAT. § 971.08." When a circuit court accepts a guilty plea, it must:

> [a]dvise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Sec. 971.08(1)(c). Here, the circuit court told Davila, "I'm advising you that if you're not a citizen of the United States, entering a plea in this case could result in deportation or other penalties under federal law[.]"

The use of quotation marks in specifying the language of the admonition is "an unusual and significant legislative signal that the statute should be followed to the letter." ***State v. Mursal***, 2013 WI App 125, ¶17, 351 Wis. 2d 180, 839 N.W.2d 173 (citations omitted). Still, a verbatim reading of the statutory warning is not required if the statute's purpose is fulfilled. *See* ***id.***, ¶¶15-20. It is unclear whether referencing "other penalties" is sufficient to satisfy the purpose of fully informing a non-citizen defendant of the immigration consequences that may result from a criminal conviction. Nevertheless, there is no arguable merit to a plea withdrawal motion on this ground. In order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶23, 343 Wis. 2d 1, 819 N.W.2d 749. The record in this case demonstrates that Davila is a natural born citizen of the United States.

Accordingly, we agree with appellant counsel's conclusion that there is no arguable merit to challenging the validity of Davila's guilty plea.

The other issue appellate counsel discusses is whether there is merit "to appealing the validity of Mr. Davila's sentence." Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The twenty-year sentence imposed is well within the forty-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Davila in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals